PEGAWAI PENYIASAT JENAYAH KORPORAT/KEWANGAN INSP JEINTHAN ANNANTHAKRISHNAN & ANOR v. ANANTHAGOPI ALAGUGANESAN

COURT OF APPEAL, PUTRAJAYA
SUPANG LIAN JCA
LIM CHONG FONG JCA
ALWI ABDUL WAHAB JCA
[CIVIL APPEAL NO: N-01(NCVC)(W)-131-03-2023]
29 AUGUST 2025

Abstract – *A police officer's arrest and detention of an individual is deemed unlawful and engages the vicarious liability of the Government if the officer's conduct is based on an afterthought or contrived justification, especially where the initial purpose of police action was different, and is carried out with callous disregard for the arrested person's constitutional right to liberty under art. 5 of the Federal Constitution.*

TORT: *Unlawful detention – Damages – Claim for – Claimant Indian national – Claimant arrived in Malaysia before country went into lockdown due to COVID-19 pandemic – Claimant stranded in Malaysia following imposition of Movement Control Order – Claimant arrested by police officer and brought before Magistrates' Court for offence of overstaying in Malaysia beyond validity period of social visit pass – Claimant detained for one month – Whether there was unlawful detention*

TORT: *Liability – Vicarious liability – Claimant Indian national – Claimant arrived in Malaysia before country went into lockdown due to COVID-19 pandemic – Claimant stranded in Malaysia following imposition of Movement Control Order – Claimant arrested by police officer and brought before Magistrates' Court for offence of overstaying in Malaysia beyond validity period of social visit pass – Claimant detained for one month – Whether Government of Malaysia vicariously liable for acts of police officer*

CONSTITUTIONAL LAW: *Fundamental liberties – Right to life and liberty – Claimant Indian national – Claimant arrived in Malaysia before country went into lockdown due to COVID-19 pandemic – Claimant stranded in Malaysia following imposition of Movement Control Order – Claimant arrested by police officer and brought before Magistrates' Court for offence of overstaying in Malaysia beyond validity period of social visit pass – Claimant detained for one month – Whether there was disregard for arrested person's constitutional right to liberty – Federal Constitution, art. 5*

The respondent, an Indian national, arrived in Malaysia on 7 March 2020 but was stranded by reason of the COVID-19 restrictions enforced pursuant to the Movement Control Order ('MCO'). His social visit pass was due to

A expire on 13 August 2020. On 19 March 2020, the Malaysian Immigration Department issued a circular allowing foreign nationals to remain in Malaysia due to the MCO ('circular'). On 10 October 2020, the police, whilst investigating a reported misappropriation and sale of a deity statue belonging to a temple, conducted a raid at a house; the respondent was B present in the said house. The respondent was arrested, dragged from the house and ferried in the police car to the police contingent headquarters. He was detained in police custody since his arrest until he was charged at the Magistrates' Court on 22 October 2020, for overstaying, an offence under s. 15(1)(c) of the Immigration Act 1959/63 ('Act'). The respondent pleaded C not guilty but bail was denied. After the police obtained the confirmation from the Malaysian Immigration Department on the validity of the circular, the respondent was again brought to the Magistrates' Court, on 10 November 2020, and released from custody. In total, the respondent had been detained in police custody for 30 days (12 days before he was charged + 18 days D further detention before his release). At the High Court, the respondent claimed for damages against the police investigation officer ('first appellant') and the Government of Malaysia ('second appellant'), premised upon, among others, the tort of unlawful detention. The High Court, in allowing the claim in part, found the first appellant liable for the unlawful arrest and detention of the respondent but only up to 22 October 2020. The appellants E were ordered to pay general and exemplary damages to the respondent. Hence, the present appeal.

Held (dismissing appeal; affirming decision of High Court)
Per Lim Chong Fong JCA delivering the judgment of the court:

F **(1)** The raid conducted on the house was for the misappropriation or theft of a temple deity statue but not for illegal overstayers. The respondent was never further investigated nor charged for misappropriation or theft under ss. 378 and 403 of the Penal Code, respectively. Hence, the first appellant's justification to arrest and detain the respondent for an offence G under the Act seemed contrived in afterthought. Otherwise, the first appellant would have demanded to see the passport and other identification papers of the respondent in the house, where the respondent's bag containing his travel documents was placed and spontaneously retrievable to show to the first appellant, rather than in the car. It smacked of a collateral purpose on the part of the first H appellant. (para 27)

(2) There was no evidence that the respondent was violent in attempting to resist arrest in the house. The first appellant also did not give cogent evidence as to why he was unable to inform the respondent of his arrest I with reasons thereto. The first appellant did not honestly believe on reasonable grounds that an immigration offence had been committed by

the respondent. Further, s. 51(3) of the Act posed a higher degree of suspicion before arrest, compared to s. 23(1)(a) of the Criminal Procedure Code. (para 28)

(3) The first appellant was callous by having persisted to detain the respondent despite knowing about the existence of the circular. Furthermore, the original passport of the respondent had been produced to the first appellant shortly after the respondent was brought to the police contingent headquarters. The 12 days which had elapsed to investigate the respondent's immigration status was *prima facie* unreasonable in this current age of electronic data and information storage and retrieval. The appellants did not provide a cogent detailed account of the length of investigative time taken, particularly the problems encountered by them to satisfy the court as to its reasonableness. This was unacceptable, especially when a man's liberty was denied during this period of investigation, in infringement of his rights under art. 5 of the Federal Constitution. (paras 30 & 31)

(4) As a result of the cavalier conduct of the first appellant in the course of his employment, it followed that the second appellant, as his employer, must be vicariously liable. Therefore, they must both be liable to the respondent for the wrongful arrest and detention. (para 32)

Case(s) referred to:

Abdul Latif Sakimin v. PP [2009] CLJU 130; [2009] 1 LNS 130 CA ***(refd)***
Ananthagopi Alaguganesan v. Menteri Dalam Negeri & Ors [2024] 10 CLJ 539 HC ***(refd)***
Chua Kian Voon v. Menteri Dalam Negeri Malaysia & Ors [2020] 1 CLJ 747 FC ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] CLJU 1416; [2012] 1 LNS 1416 CA ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 23(1)(a)
Federal Constitution, art. 5
Immigration Act 1959/63, ss. 6(1), 15(1)(c), 51(3)(a), (5)(b)
Penal Code, ss. 378, 403, 406

For the appellants - Amalina Zainal Mokhtar; SFC, Mohamad Shafiq Mohd Sazalli & Intan Noor Nazimah Nazi; FCs
For the respondent - Karthigesan Shanmugam, Thamayanthy A Rajasekaran & Muniandy Vestanathan; M/s Karthig Shan

[Editor's note: Appeal from High Court, Seremban; Suit No: NA-21NCvC-16-12-2020 (affirmed)]

Reported by Najib Tamby

A

JUDGMENT

Lim Chong Fong JCA:

Introduction

[1] This is an appeal concerning unlawful arrest and detention.

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[2] The first and second appellants are a police investigation officer and the Federal Government of Malaysia respectively.

[3] The respondent is an Indian foreign national.

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[4] We heard the appeal on 30 April 2025 and thereafter adjourned our decision to deliberate on the arguments advanced by the parties.

[5] Now having done so, we give our decision below with the supporting grounds.

Background

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[6] The respondent arrived in Malaysia on 7 March 2020 but was stranded by reason of the COVID-19 restrictions enforced pursuant to the Movement Control Order ("MCO"). The social visit pass of the respondent was due to expire on 13 August 2020.

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[7] The Malaysian Immigration Department however on 19 March 2020 issued a circular allowing foreign nationals to remain in Malaysia due to the MCO ("circular").

[8] On 10 October 2020, the police at about 11.55pm, whilst investigating on a reported misappropriation and sale of a deity statue belonging to the

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Sri Balatandayuthabani temple in Rantau, Negeri Sembilan, conducted a raid at a house in Port Dickson, Negeri Sembilan.

[9] The first appellant together with another police officer entered the house and arrested the respondent who was with the owner of the house.

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[10] The police dragged the respondent out from the house and ferried him in the police car to the Seremban police contingent headquarters.

[11] The respondent was detained in police custody since his arrest pursuant to s. 51(5)(b) of the Immigration Act 1959/63 until he was charged in the Magistrates' Court on 22 October 2020.

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[12] Before the Magistrate, the respondent was charged under s. 15(1)(c) of the Immigration Act 1959/63 for the offence of overstaying. The respondent pleaded not guilty, but bail was denied.

[13] After the police obtained the confirmation from the Malaysian

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Immigration Department on the validity of the circular on 5 November 2020, the respondent was again on 10 November 2020 brought to the Magistrates' Court and released from custody.

[14] The respondent had therefore been detained in police custody for 12 days before he was charged and thereafter detained for a further 18 days before he was finally released.

[15] Consequently, the respondent on 28 December 2020 initiated suit No. NA-21NCvC-16-12/2020 in the High Court ("suit").

[16] The respondent contended that he was unlawfully arrested and detained; thus, he claimed for the following reliefs in the suit (in Bahasa Melayu):

(a) Satu perintah bahawa Defendan-defendan membayar sejumlah RM3,000,000.00 sebagai ganti rugi penahanan salah kepada Plaintif dalam tempoh masa (14) hari selepas perintah Mahkamah diberikan;

(b) Defendan-Defendan membayar ganti rugi am kepada Plaintif yang akan ditaksirkan;

(c) Defendan-Defendan membayar ganti rugi teladan kepada Plaintif yang akan ditaksirkan;

(d) Faedah ke atas jumlah penghakiman pada kadar 5% setahun dari tarikh penghakiman sehingga tarikh penyelesaian penuh;

(e) Kos; dan

(f) Apa-apa relif lain yang difikirkan adil, munasabah, atau suai manfaat oleh Mahkamah yang mulia ini.

[17] This has been strenuously denied by the appellants who contended that the actions taken by the police against the respondent were at all material times in accordance with the law.

[18] After trial, the learned High Court Judge on 15 February 2023 found for the respondent and gave the following judgment in his favour ("judgment") (in Bahasa Melayu):

(a) Bahawa Inspektor Jeinthan Annanthakrishnan (D5) dan Kerajaan Malaysia (D6) adalah bertanggungan secara bersesama dan berasingan terhadap penahanan tidak sah (Unlawful arrest) Plaintif daripada 10.10.2020 sehingga 22.10.2020;

(b) Bahawa D5 dan D6 diperintahkan untuk membayarsecara bersesama dan berasingan kepada Plaintif sebanyak (RM15,000.00 sehari x 12 hari) yang keseluruhannya berjumlah RM180,000.00 (Ringgit Malaysia Satu Ratus Lapan Puluh Ribu) sebagai Ganti rugi Am untuk tempoh penahanan tidak sah tersebut;

(c) Bahawa D5 dan D6 diperintahkan untuk membayar kepada Plaintif secara bersesama dan berasingan sebanyak RM45,000.00 (Ringgit Malaysia Empat Puluh Lima Ribu) sebagai Ganti rugi teladan; dan

(d) Bahawa D5 dan D6 diperintahkan untuk membayar kos secara bersesama atau dan berasingan sebanyak RM30,000.00 kepada Plaintif.

A (e) Bahawa D5 dan D6 membayar secara bersesama dan berasingan faedah ke atas jumlah penghakiman pada kadar 5% setahun dari tarikh penghakiman sehingga tarikh penyelesaian penuh.

[19] The grounds of judgment of the learned High Court Judge ("GOJ") are comprehensive and have been reported in *Ananthagopi Alaguganesan* B *v. Menteri Dalam Negeri & Ors* [2024] 10 CLJ 539. The GOJ read, *inter alia*, as follows:

> [22] Considering all the circumstances of the case and having seen the testimonies of the witnesses, I was of the view that the version of events as testified by the plaintiff and Mr Mahendran was more representative C of the truth.
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> [55] Under s. 28 of the Criminal Procedure Code, a person who has been arrested without a warrant must be brought before a Magistrate within 24 hours of his arrest. In the present case, the plaintiff was only brought D before a Magistrate on the 12th day following his arrest.
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> [56] This was explained by the fact that the arrest of the plaintiff was effected under the Immigration Act 1959/63, which permits the detention of non-citizens for 14 days before the non-citizen must be brought before a Magistrate. This is discussed in the following paragraphs.
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> E Arrest Under The Immigration Act 1959/63
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> [57] The power of arrest under the Immigration Act 1959/63 is provided under s. 51(3)(a), which reads as follows:
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> > (3)(a) Any police officer, immigration officer or Customs Officer F may arrest without warrant any person who he reasonably believes has committed an offence against this Act.
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> [58] There is a notable difference in the words employed in s. 51(3)(a), compared to those in s. 23(1)(a) of the Criminal Procedure Code. Under the Immigration Act 1959/63, a police officer may arrest any person without a warrant if "he reasonably believes" that that person has G committed an offence under the Immigration Act 1959/63. By contrast, under the Criminal Procedure Code, an arrest without warrant may be affected if "a reasonable suspicion exists" that the person to be arrested was concerned in a seizable offence.
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> [59] In my considered view, the formulation of words suggests that the H applicable test under s. 51(3)(a) of the Immigration Act 1959/63 is a subjective rather than objective one. What matters is that the arresting officer had an honest belief that an immigration offence has been committed. Nonetheless, the inclusion of the word "reasonably" must mean that there is still an element of objectivity: there must be a reasonable basis for the arresting officer to hold such belief.

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[60] In my considered view, the onus of proving that the arresting officer held an honest belief that an immigration offence has been committed and that there was a reasonable basis for him to have held that belief, must lie with the arresting officer. This would be consistent with the position under the Criminal Procedure Code.

[61] As alluded to above, a non-citizen detained under a power exercised pursuant to the Immigration Act 1959/63 must be produced before a Magistrate within 14 days of his arrest. This is provided for in s. 51(5)(b), the material portion of which is reproduced below:

> (5) Notwithstanding anything contained in this Act or in any subsidiary legislation made under this Act:
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> ...
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> (b) where any person other than a citizen is arrested or detained under this Act, whether for an offence against this Act or otherwise than for such offence, and has not been earlier released, or charged in court for an offence against this Act, or removed from Malaysia under this Act, he shall, within fourteen days of his arrest or detention, be produced before a Magistrate who shall make an order for his detention for such period as may be required by an immigration officer or a police officer for the purpose of investigations into an offence against this Act, or by an immigration officer for the purpose of either making inquiries, or effecting his removal from Malaysia, under this Act,

and any provision of this Act or any subsidiary legislation made under this Act providing for the arrest or detention, otherwise than for an offence, of a person who is a citizen, or for the arrest or detention of a person other than a citizen, whether for an offence against this Act or otherwise than for such offence, shall be read as being subject to the provisions of paragraph (a) or (b), as may be applicable:

> Provided that the Magistrate before whom such person is produced under paragraph (a) or (b), as the case may be, shall not authorize or order the detention of such person for a period in excess of the maximum period which may be specified in the provision under which he is to be detained.

[62] On the facts of the present case, the plaintiff was brought before the Magistrate before the expiry of the period prescribed under s. 51(5)(b) of the Immigration Act 1959/63.

Detention by Order of Magistrate

[63] The undisputed facts of the present case were that the plaintiff was detained in police custody for 12 days before he was charged. After he was charged, he was detained for a further 18 days under a remand order before his release.

[64] As a general rule, no claim for unlawful arrest or false imprisonment may be made in respect of the period of detention after the arrested person has been charged in court. The authority for this proposition is the

decision of the Federal Court in *Chong Fook Kam & Anor v. Shaaban & Ors*. However, as we shall see, there is an important exception to this general rule.

[65] There are two reasons for the general rule. The first is that the law provides for the immunity of judges and persons acting in a judicial capacity. The second is s. 32(1) of the Police Act 1967, which shields a police officer from liability in circumstances where the detention is carried out in compliance with an order of court. A police officer may not, however, avail himself of the protection of s. 32(1), where the order of court detaining the arrested person had been procured through a disobedience of the applicable provisions of law on the part of the officer in question.

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[73] As alluded to at para. 56 *ante*, the fact that the plaintiff was only brought before a Magistrate some 12 days after his arrest indicated that Inspector Jeinthan had intended for the arrest to be effected pursuant to the Immigration Act 1959/63. Had this not been the case, the arrest would have contravened s. 28 of the Criminal Procedure Code.

[74] It will be recalled that, immediately after the arrest of the plaintiff, Inspector Jeinthan had filed the police report bearing the reference Port Dickson 4638/20. No mention was made in this report regarding the arrest having been effected under the Immigration Act 1959/63. It was only 16 days later that he filed a corrective report making reference to s. 6(1)(c) of the Immigration Act 1959/63.

[75] However, the plaintiff had himself testified that he had been told after his arrest and while he was in the police car that he had been arrested because his social visit pass had expired. This supported the conclusion that the corrective report was not a mere afterthought and that Inspector Jeinthan had exercised his powers of arrest under the Immigration Act 1959/63.

[76] Despite this, I was nonetheless of the view that the arrest and the detention of the plaintiff were unlawful. The reasons are as follows:

> (i) first, the plaintiff was not informed at the time of his arrest of the grounds for his arrest and detention. The evidence established at trial showed that the plaintiff was only told of the reasons of his arrest after he had been arrested, when he was in the car and being brought to IPK Seremban.

As explained, the law is very clear on the need to inform the arrested person of the grounds of his detention. The failure to do so amounts to a contravention of the constitutional protection accorded to the plaintiff under art. 5(3) of the Federal Constitution, which reads as follows:

> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

This right of protection accrues even to non-citizens:

(ii) second, the failure to inform the plaintiff at the time he was apprehended had deprived the plaintiff of an opportunity to retrieve his passport, which would have established that he had validly entered the country.

Inspector Jeinthan's testimony was that the plaintiff had not complied with his request to produce his identification documents. For the reasons explained at para. 19 *et seq*, *ante*, I found this to be improbable. The unchallenged testimony of PW1 was that the plaintiff's sling bag containing his passport was beside a chair in PW1's house. Had Inspector Jeinthan identified himself as a police officer and had the plaintiff been asked to produce his identification documents, then it was extremely unlikely that he would have had defied the request, given that the passport was within easy reach. The more probable truth was that the plaintiff was apprehended without explanation, and importantly, without a reasonable opportunity being afforded to him to produce his identification documents.

Put another way, Inspector Jeinthan could not have had a reasonable basis for his belief that an offence had been committed under the Immigration Act 1959/63 without first having given the plaintiff an opportunity to produce his passport before arresting him. It will be recalled that the plaintiff was initially arrested under s. 6(1)(c) of the Immigration Act 1959/63, for having entered Malaysia without a valid pass. In order for Inspector Jeinthan to have formed the belief that an immigration offence had been committed, there must have been a failure by the plaintiff to produce his passport when asked. The evidence established at trial showed that, on balance, the plaintiff had not been afforded this opportunity. Even under the more generous subjective test under s. 51(3)(a) of the Immigration Act 1959/63, a reasonable belief on the part of Inspector Jeinthan could not have existed;

(iii) third, and perhaps most egregiously, was the fact that Inspector Jeinthan found it fit to exercise the power to arrest and detain the plaintiff in ignorance of the law.

As explained at para. 3 *antes*, the plaintiff was stranded in Malaysia due to the Government-imposed lockdown to curb the spread of the COVID-19 virus. He had validly entered Malaysia on a social visit pass, but could not leave before the expiry of the validity period of the visit pass.

The 19 March 2020 circular issued by the Director General of the Department of Immigration meant that all foreigners who became stranded in Malaysia due to the imposition of Movement Control Orders could lawfully remain in Malaysia even though the validity period of their immigration passes may have expired.

When cross-examined by counsel, Inspector Jeinthan admitted that he in fact knew of the 19 March 2020 Department of Immigration circular at the time he arrested the plaintiff.

Yet, despite knowing of the circular, he had proceeded to arrest the plaintiff without giving him a reasonable opportunity to produce his travel documents, and had kept the plaintiff in detention because, according to his testimony at trial, the authenticity of the 19 March 2020 Department of Immigration circular needed to have been ascertained by the court.

If he knew of the existence of the 19 March 2020 circular, then surely the plaintiff ought to have been released from custody - at the very latest - on 20 October 2020 when confirmation was received that the plaintiff's passport and visa had been ascertained as genuine. Indeed, on the facts, I am of the view that the plaintiff ought not have been detained at all, if he had been accorded reasonable opportunity to produce his identification documents.

Yet, despite having received confirmation from the Immigration Forensic Centre of the Malaysian Immigration Academy that the passport and visa were genuine, and despite professing knowledge that he knew of the existence and effect of the 19 March 2020 circular at the time of the arrest, Inspector Jeinthan not only did not release the plaintiff from custody, but had proceeded to recommend that he be charged for contravention of s. 15(1)(c) of the Immigration Act 1959/63.

It is the business of a police officer to know the law. If ignorance of the law accords an offender no excuse, then it must be doubly so for someone in whom it had been reposed the duty to enforce the law.

But here, Inspector Jeinthan professed to know the law. Yet, his actions were inexplicable if this was indeed true. The only reasonable alternative conclusion must be that he had exercised his powers in furtherance of an undisclosed collateral purpose.

[77] At trial, evidence was received regarding irregularities in the manner in which investigations had been conducted, which hinted at the existence of such a collateral purpose. The initial investigating officer assigned to the case, Inspector Roheswaran Ganesan (DW1), agreed with the suggestion of counsel for the plaintiff that the investigation into the theft of the missing statute of the deity was under the jurisdiction of the IPD Seremban, and not IPK Seremban, where Inspector Jeinthan was stationed. However, there was no documentary evidence adduced at trial to show that there had been instructions for the investigations to be taken over by IPK Seremban.

[78] Inspector Roheswaran further testified that he was directed to hand over the conduct of the investigation to Inspector Jeinthan, although in the trial documents, there were no written directions exhibited. This in

effect meant that Inspector Jeinthan was the arresting officer, the investigating officer, as well as the recording officer who had taken the statement from the plaintiff. A

[79] I was of the view that the evidence adduced at trial fell short of proving the existence of a collateral purpose on the part of Inspector Jeinthan. In the final analysis, it was not necessary for the plaintiff to prove the existence of such a collateral motive to succeed in his case for unlawful arrest and detention against Inspector Jeinthan. Even absent such motive, the plaintiff has successfully established that his arrest and subsequent detention was unlawful. B

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[93] I have no hesitation to find that, on the facts of the present case, there was a sufficiently close connection between the position of Inspector Jeinthan and the wrongful conduct that he had committed to make it just that the Government be made liable for his acts. The arrest had been undertaken by Inspector Jeinthan in the course of his employment. There was a clear connection between the arrest and the nature of his employment, as the arrest had been undertaken in the exercise of his powers of investigations conferred upon an officer of the Royal Malaysian Police. The third element has also been clearly fulfilled, as the danger to the public of police powers exercised in excess needs little elaboration. Finally, this risk is clearly one that is inherent in Government, and adequate safeguards must exist, not only in the form of adequate laws, but also in putting in place controls and oversight to prevent the abuse of police powers. D E

[94] I was unable to discern serious conviction in the arguments raised to oppose the contention of vicarious liability on the part of the Government. There were two principal points put forth: first, that liability must first be proven against Inspector Jeinthan, before the Government may be made vicariously liable. This submission was undeniably correct. As I have found liability on the part of Inspector Jeinthan, this requirement has been fulfilled. F

[95] Second, it was advanced for the defendants that Inspector Roheswaran had not been named as a defendant in the action, and therefore, based on the principles established in the Federal Court case of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors*, liability cannot attach against the Government. I must confess that I was unable to follow the reasoning advanced. Clearly, the case of *Lay Kee Tee* prohibits a plaintiff from making a claim against the Government without naming the specific tortfeasor as a party in the action. However, this requirement has been fulfilled in the present case, as Inspector Jeinthan has been made a defendant. Misconduct alleged against Inspector Roheswaran, if any, clearly did not form any part of the causes of action advanced in this case. This did not have any effect on the incidence or extent of the Government's liability for the actions of Inspector Jeinthan. G H I

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[99] I agreed with Mr Karthig Shan's submission, and awarded RM15,000 per day for the 12 days of unlawful detention as general damages payable. The total general damages payable was thus RM180,000.

[100] The plaintiff also claimed for exemplary damages.

[101] The principles to be applied in determining whether exemplary damages ought to be allowed are explained in the following passage of the judgment of the Court of Appeal in the case of *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors & Another Appeal* [2017] CLJU 500; [2017] 1 LNS 500; [2018] 1 MLJ 784:

> [32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.
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> [33] The exemplary damages or punitive damages - the two terms now regarded as interchangeable - are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a "contumelious disregard" for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff. (See *Rookes v. Barnard* [1964] 1 All ER 347; *A B v. Southwest Water Services* [1993] All ER 609; *Broome v. Cassell & Co* [1971] 2 QB 354; *Laksamana Realty Sdn. Bhd. v. Goh Eng Hwa and Another Appeal* [2005] 4 CLJ 871; [2006] 1 MLJ 675).

[102] Accordingly, there must have been some exceptional conduct on the part of the defendant before exemplary or aggravated damages would be awarded to a plaintiff. The case of *Rookes v. Barnard* restricted exemplary damages to the following three situations:

(i) where they are recognised by statute;

(ii) where the wrong involves oppressive, arbitrary or unconstitutional actions by agents of the Government;

(iii) where the defendant's tortious act has been done with guilty knowledge, for the motive that the chances of economic advantage outweigh the chances of economic or perhaps physical penalty.

[103] In my considered judgment, the circumstances of the case described at para. 76(iii) *antes* sufficiently justified the award of exemplary damages. The arrest had not been affected on the basis of an innocent mistake, nor based upon an honest belief on reasonable grounds that an immigration offence had been committed. Had an opportunity been given to the plaintiff, I have no doubt that he would have been able to produce his

passport to Inspector Jeinthan. Even then, had Inspector Jeinthan entertained further doubts on the authenticity of the passport and visa, checks could have been made without the need to arrest the plaintiff and to place him in custody for 12 days. Most egregiously, Inspector Jeinthan professed to know of the existence and effect of the 19 March 2020 Department of Immigration circular, but yet proceeded to recommend that the plaintiff be charged with the offence of overstaying when clearly general permission to remain in Malaysia had been granted to non-residents due to the COVID-19 pandemic and due to the ensuing imposition of Movement Control Orders. At the most generous, Inspector Jeinthan was ignorant of the law. At worst, the evidence at trial hinted at some collateral motive, if his own evidence that he was aware of the existence of the 19 March 2020 circular was to be believed. Either way, the second of the three circumstances in *Rookes v. Barnard* has been fulfilled.

[104] I assessed exemplary damages at 25% of the restitutive damages awarded. I drew guidance from the following passage in the Court of Appeal decision in *Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35; [2005] 1 MLJ 515:

> 48. There is no fixed formula or rate in awarding exemplary damages. In the present appeal, the trial judge awarded the sum of RM900,000. In his judgment the learned judge stated that he followed the formula in *Templeton v. Low Yat Holdings Sdn Bhd* [1992] CLJU 7; [1993] 1 MLJ 443 where the court awarded exemplary damages of about 25% of the compensatory damages assessed. In the present appeal the compensatory damages by the learned judge was RM3.2 million and 25% of that would be RM900,000. That was how the learned judge arrived at the figure. I see no reason to disturb the award made by the learned judge.

[105] Accordingly, I assessed exemplary damages to be RM45,000, making the total damages payable to the plaintiff to be RM225,000. I ordered that the liability of the fifth and sixth defendants for such damages and for costs of the action to be joint and several.

[20] The appellants are dissatisfied with the judgment and therefore have on 15 March 2023 appealed to the Court of Appeal.

Findings Of This Court

[21] Our function here is merely that of a review. This is well explained by Zabariah Mohd Yusof FCJ in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 as follows with emphasis added by us:

> [71] From the aforesaid authorities, there appears to be a difference in approach taken and applied by the UK Supreme Court and the approach taken by the Malaysian courts. Whilst Lord Reed in *Henderson* (*supra*) separated the four non-exhaustive identifiable errors of a trial judge from the plainly wrong test:

(i) a material error of law;

(ii) a critical finding of fact which has no basis in the evidence;

(iii) demonstrable misunderstanding of relevant evidence; and

(iv) a demonstrable failure to consider relevant evidence;

(all of which justifies appellate intervention of a trial judge's decision), this court in *Gan Yook Chin* (*supra*) effectively included them under what amount to the trial judge as being "plainly wrong".

[72] The phrase "lack of judicial appreciation of evidence" used in *Gan Yook Chin* (*supra*) could very well encompass three out of four errors of a trial judge (other than the "material error of law") said to be identifiable by Lord Reed in *Henderson* (*supra*), namely:

(i) critical factual finding which has no basis in evidence;

(ii) demonstrable misunderstanding of relevant evidence; and

(iii) demonstrable failure to consider relevant evidence.

[73] Given that the issue at present is about identifying situations where the findings of fact by a trial court justify appellate intervention, the other identifiable error of "material error of law" listed by Lord Reed in *Henderson* (*supra*) can occur when a trial judge erroneously apply legal principles (*eg*, rules of evidence) in the course of making a finding of fact, thus resulting in a lack of judicial appreciation of evidence. For example, when a trial judge erroneously placed a burden of proof on a party, that will lead the judge to misdirect himself when he attempts to interpret the factual matrix before him. The commission of material error of law by the trial judge in arriving at his conclusions (*eg*, the requirement of proof of intention in constructive trust as opposed to express trust), also justifies an appellate court reversing such conclusions.

[74] Thus, whilst there is a slight difference in approach of appellate intervention, both the UK Supreme Court and our Federal Court effectively shares a common thread where it has been held that appellate intervention is justified where there is lack of judicial appreciation of evidence.

[75] The Court of Appeal in Singapore applies the plainly wrong test which is similar to our Federal Court, as illustrated in *Damu Jadhao v. Paras Nath Singh* [1965] CLJU 30; [1965] 1 LNS 30; [1976] 1 MLJ 151, when it held:

> The principles under which an appellate court acts when an appellant seeks to displace the conclusion arrived at by a trial judge on questions of fact have been very recently restated by the Privy Council in the case of *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] CLJU 202; [1964] 1 LNS 202; [1964] MLJ 92 and [1965] 2 MLJ 151 at 153 need only refer to a passage of the judgment of Lord Guest when dealing with the matter, where he states:

> Before the Court of Appeal in Singapore was entitled to reject the trial judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.
>
> This case seems to me to be completely dependent on the trial judge's estimate of the credibility of the appellant and his witnesses and nothing that counsel for the appellant has put forward in his arguments before me has persuaded me that the trial judge's view of the credibility of the witnesses before him was in any way plainly wrong.

[76] What is pertinent is that, the "plainly wrong" test is not intended to be used by an appellate court as a mean to substitute its own decision for that of the trial court on the facts.

[77] It is to be observed that this court in *Tengku Dato' Ibrahim Petra Tengku Indra Petra* (*supra*) had referred to *McGraddie* (*supra*) and *Henderson* (*supra*) and has adopted the *Henderson* (*supra*) approach of the "plainly wrong" test in determining whether the trial court's findings of fact is reversible upon appeal:

> Recently in *Henderson v. Foxworth Investments Ltd And Another* [2014] 1 WLR 2600, the United Kingdom Supreme Court held that in the absence of some other identifiable error, such as a material error of law or the making of a critical factual finding which had not interfered with the factual finding which had no basis in the evidence, an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was "plainly wrong" in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached, and that if the appellate court was not satisfied that the decision came within that category it was irrelevant that, with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[78] Hence following this court's ruling in *Tengku Dato' Ibrahim Petra Tengku Indra Petra* (*supra*) an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was "plainly wrong" where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid category, it is irrelevant, even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[79] The outcome of the present appeal would therefore turn upon whether the findings of the learned trial judge were reasonably made.

...

A [148] Given the aforesaid, *we form the view that rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the "plainly wrong" test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant.*
B *In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.*

(emphasis added)

C See also *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] CLJU 1416; [2012] 1 LNS 1416.

[22] Before us the appellants firstly and primarily submitted that the respondent was properly and lawfully apprehended by the first appellant for an offence under s. 6(1) of the Immigration Act 1959/63 and s. 406 of the
D Penal Code on the night of 10 October 2020.

[23] This is in our view an issue of mixed fact and law.

[24] In respect of the former, this necessarily depends on the veracity of the evidence adduced by the material witnesses.

E **[25]** It is settled law that an appellate court is generally reluctant to interfere on findings of fact because this is heavily dependent on the testimony of the rival witnesses of the respective party as is the case here between the first appellant and respondent on exactly what happened on that night. In this regard, the learned High Court Judge is best placed to determine
F the reliability on the witnesses based on the relative weight to be given to their evidence adduced. The appellate court will defer to the findings of the learned High Court Judge who has the audio-visual advantage of assessing the demeanour and credibility of the witnesses to resolve the conflict of oral testimony of the witnesses; see *Abdul Latif Sakimin v. PP* [2009] CLJU 130; [2009] 1 LNS 130; [2009] MLJU 1828.
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[26] Consequently, and upon our review of the notes of evidence and thereafter the findings of the learned High Court Judge in paras. 73 to 79 particularly para. 76 of GOJ, we do not find that the learned High Court Judge has been plainly wrong in any way that attracts appellate intervention.

H **[27]** Additionally, we find that the raid conducted in the house was for the misappropriation or theft of a temple deity statue but not for illegal overstayers. The respondent was thereafter never further investigated nor charged for misappropriation or theft under ss. 378 and 403 of the Penal Code respectively. Hence, we concur with the learned High Court Judge that
I the first appellant's justification to arrest and detain the respondent for an offence under the Immigration Act 1959/63 seems contrived in afterthought. Otherwise, the first appellant would have demanded to see the passport and

other identification papers of the respondent in the house (where the respondent's bag containing his travel documents was placed and spontaneously retrievable to show to the first appellant) rather than in the car. It smacks of a collateral purpose on the part of the first appellant as alluded to by the learned High Court Judge.

[28] We are mindful that the appellants submitted that the respondent need not, pursuant to art. 5 of the Federal Constitution and the case of *Chua Kian Voon v. Menteri Dalam Negeri Malaysia & Ors* [2020] 1 CLJ 747; [2020] 1 MLJ 351 be informed of his arrest forthwith but as soon as may be possible. This is however fact sensitive and it depends on the actual circumstances that existed. In this case, there is no evidence that the respondent was violent in attempting to resist arrest at all material times in the house. The first appellant did not also give cogent evidence as to why he was unable to inform the respondent of his arrest with reasons thereto. We consequently concur with the learned High Court Judge that the first appellant did not honestly believe on reasonable grounds that an immigration offence had been committed by the respondent. We also noted that s. 51(3)(a) of the Immigration Act 1959/63 posed a higher degree of suspicion before arrest compared to s. 23(1)(a) of the Criminal Procedure Code as found by the learned High Court Judge.

[29] Secondly, it is not in dispute here that after the respondent was arrested in the car, he was detained for 12 days before he was charged in the Magistrates' Court. The appellants however tried justifying that the time taken was reasonable because of the need to verify the authenticity of the respondent's passport and visa as well as applicability of the circular. The appellants ultimately found that the respondent's passport and visa are genuine notwithstanding that the latter had expired. Likewise, the circular was indeed issued by the Malaysian Immigration Department but in force during the period of MCO. The circular, however, has thereafter been replaced by the Recovery Movement Control Order ("RMCO").

[30] Upon our review, we concur with the learned High Court Judge that the first appellant was callous by having persisted to detain the respondent notwithstanding he knew of the existence of the circular. Furthermore, the original passport of the respondent has been produced to him shortly after the respondent was brought to the Seremban Police Contingent Headquarters. Although, the MCO has been replaced by the RMCO, we do not think that this has made a material difference on the facts and circumstances of this case.

[31] Further still, we are also of the view that the 12 days which had elapsed to investigate the respondent's immigration status is *prima facie* unreasonable in this current age of electronic data and information storage and retrieval. The appellants did not provide cogent detailed account of the

A length of investigative time taken, particularly problems that were encountered by them to satisfy the court as to its reasonableness. This is unacceptable particularly when a man's liberty is denied during this period of investigation in infringement of his rights under art. 5 of the Federal Constitution.

B **[32]** As a result of the cavalier conduct of the first appellant in the course of his employment, it follows that the second appellant must be vicariously liable as his employer. Thus, we concur with the finding of the learned High Court Judge that they must both be liable to the respondent for wrongful arrest and detention.

C **[33]** We observed that the appellants did not challenge on the consequential award of restitutive damages awarded to the respondent by the learned High Court Judge.

[34] However, as to exemplary or punitive damages awarded to the
D respondent which has been challenged by the appellants, we concur with the learned High Court Judge that it is justified due to the wrongful, oppressive, arbitrary or unconstitutional action by the first appellant who is an agent of the second appellant.

Conclusion

E **[35]** For the foregoing reasons, we find that the appellants' appeal is unmeritorious. The learned High Court Judge was not plainly wrong both in respect of the finding of fact or conclusion of law that warrants appellate intervention.

F **[36]** Consequently, the appeal is unanimously dismissed and the judgment of the High Court is affirmed. The appellants shall pay costs of RM30,000 here to the respondent.

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